GOVERNMENT OF MALAYSIA v. NG SONG CHOON

[O.C.J. (Arulanandom J.) December 16, 1974]
[Ipoh — Civil Suit No. 300 of 1972]

Income Tax — Claim for income tax — Application for leave to sign final judgment — Defence that claim statute-barred — Whether unconditional leave to defend can be given — Income Tax Act, 1967, ss. 91(1), 91(3) and 103.

In this case the appellant filed a specially indorsed writ claiming payment of the sum of $2,267,368.31 as income tax and penalties due. The claim was in respect of additional assessments for the years 1953 to 1970. The respondent raised the defence that the claim on the alleged income calculated on the increase in his assets for the years of assessment 1953 to 1959 were statute-barred by virtue of the provisions of sections 69(1) and 91(1) of the Income Tax Ordinance 1947 and the Income Tax Act, 1967, respectively. The appellant applied for leave to sign final judgment. The Senior Assistant Registrar gave leave to the appellant to sign final judgment in respect of the amounts pertaining to the years of assessment 1960-1970, but in regard to the amounts in respect of the years 1953 to 1959 he gave the respondent unconditional leave to defend on the ground that a triable issue was disclosed. On appeal,

Held, dismissing the appeal: the taxpayer was not precluded from raising the plea that the claim was statute-barred and unless and until the court was satisfied that the Director-General had exercised his powers correctly when making assessment under section 91(3) of the Income Tax Act, the court could not possibly adjudicate.

Cases referred to:-

(1) *Comptroller of Income Tax, States of Malaya* v. *H.K.V.* [1968] 2 M.L.J. 260.

(2) *Sun Mun Tobacco Co. Ltd.* v. *Government of Malaysia* [1973] 2 M.L.J. 163.

(3) *A.B.C.* v. *Comptroller of Income Tax, Singapore* [1959] M.L.J. 162.

(4) *Syn Lee & Co. Ltd.* v. *Bank of China* [1961] M.L.J. 87.

(5) *Lloyd's Banking Co.* v. *Ogle* L.R. 1 Ex. D. 262.

APPEAL.

Zulkifli bin Mahmood (Senior Federal Counsel) for the appellant.

R. R. Chelliah (*P. S. Gill* with him) for the respondent.

Arulanandom J.: This is an appeal against an order of the Senior Assistant Registrar giving leave to the defendant to defend part of the claim of the plaintiff against the defendant for additional taxes for a period of about sixteen years. The plaintiff, the Government of Malaysia, issued notices of additional assessments in the years 1970 and 1972 for the years 1953 to 1970 and the notices were duly posted and served on the defendant. After the usual period of one month penalties were also imposed and the final claim was for $2,267,368.31. In September, 1972 the plaintiff filed a specially indorsed writ against the defendant claiming this sum and this was duly served on the defendant on the 7th of April, 1973. Subsequently the plaintiff amended its statement of claim but for the purpose of this appeal both amendments are immaterial.

The defendant entered appearance on the 13th day of April, 1973 and on the 22nd day of September, 1973 filed his statement of defence. In his defence the defendant raised the defence in particular that the alleged income calculated on the increase in his assets for the years of assessment 1953 to 1959 are statute barred by virtue of the provisions of sections 69(1) and 91(1) of the Income Tax Ordinance, 1947 and the Income Tax Act, 1967 respectively.

On the 9th day of April, 1974 the plaintiff applied by Summons-in-Chambers under O.14 for leave to sign final judgment. At the hearing counsel for the defendant conceded that as far as the years of assessment for the years 1960 to 1970 were concerned, the defence could not raise any triable issues as they were precluded from doing so under the provisions of section 106(3) of the Income Tax Act, 1967 which states:

"106.(3) In any proceedings under this section the court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under section 103(4) or (5)."

but the defendant argued that as far as the years 1953 to 1959 were concerned, the plea of limitation that it was statute barred did raise a triable issue which was not caught by section 106(3) of the Act. The Senior Assistant Registrar after hearing gave leave to the plaintiff to sign final judgment in respect of the amounts pertaining to years of assessment 1960 to 1970. As for the amounts in respect of the years 1953 to 1959, the Senior Assistant Registrar gave defendant unconditional leave to defend on the ground that a triable issue was disclosed.

In the last few years the income tax law has been considered in depth by the courts of this country and there are now various dicta which need not be considered at length here as the law was well established and settled. Firstly is that there is no equity in tax law. I will only refer to the reported case of *Comptroller of Income Tax, States of Malaya* v. *H. K. V.*[1] where the judge quoted from *Maxwell* on Interpretation of Statutes (11th Edition) page 128 said:

"In a Taxing Act, one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.... In a case of reasonable doubt the construction most beneficial to the subject is to be adopted. Still less is the language of a section to be strained in order to tax a transaction which, had the legislature thought of it, would have been covered by appropriate words."

The plaintiff in this case was exercising its powers under sections 91(1) and 91(3) of the Act which read —

"91.(1) The Director General, where for any year of assessment it appears to him that no or no sufficient assessment has been made on a person chargeable to tax, may in that year or within twelve years after its expiration make an assessment or additional assessment, as the case may be, in respect of that person in the amount or additional amount of chargeable income and tax or in the additional amount of tax in which, according to the best of the Director General's judgment, the assessment with respect to that person ought to have been made for that year.

(3) The Director General where it appears to him that —

(a) any form of fraud or wilful default has been committed by or on behalf of any person; or

(b) any person has been negligent,

in connection with or in relation to tax, may at any time make an assessment in respect of that person for any year of assess-

ment for the purpose of making good any loss of tax attributable to the fraud, wilful default or negligence in question."

It is clear from section 91(1) that where assessments were made within twelve years after the expiration of any year of assessment the Director General according to his best judgment can make the assessment. Subsection (3) however says that the Director General where it appears to him that there has been any form of fraud or wilful default or negligence on the part of the taxpayer he may at any time make an assessment in respect of that person for any year of assessment.

In this case the taxpayer raised limitation as a defence and it was necessary for the court to decide whether there was a triable issue. It is settled law that where the taxes become payable under section 103(1) of the Act no defence can be raised in the court that the tax was not payable or was being appealed against or is incorrect. See *Sun Man Tobacco Co. Ltd.* v. *Government of Malaysia.*[2] It is even held in the case of *A. B. C.* v. *The Comptroller of Income Tax, Singapore*[3] that the validity of the notices of assessment and additional assessment is immaterial in determining the objections by the taxpayer. In this case the issues were entirely different to those raised in the ordinary course of events. Here the defendant was resisting leave to sign final judgment for the tax for the period 1953 to 1959 on the ground that they are statute barred. In the case of *Syn Lee & Co. Ltd.* v. *Bank of China,*[4] Thomson C.J. (as he then was) had this to say about leave to sign final judgment under O.14:

"My own view is so well expressed in the words of Bramwell B. in the case of *Lloyd's Banking Co.* v. *Ogle*[5] that I do not find it necessary to go much further than to quote his words:—

'The power to sign judgment was, in my opinion, intended to apply to those cases which almost on the admission of the defendant are undefended, and not to cases in which the defendant might reasonably say, 'I do not know if your case is well founded or not, but I require you to prove it'."

Later on his Lordship repeated that last phrase by saying: —

"Where a guarantor *bona fide* says that he does not know that the debt is due, and that he requires it to be proved, I think the statute was not intended to operate to take that right from him."

Limitation is a good defence plea in law and no court can adjudicate on it without a trial and without having the facts proved. When the plea that a claim is statute barred is raised in court it precludes any question of legality, correctness or rights. All it means is that no claim for the enforcement of that right can be entertained by the courts and no relief can be given by the courts. To give a simple example there may be a lawful debt due by the defendant to the plaintiff but if the claim is made after the period of limitation the court will not grant relief. The question of merits does not arise. In this case the plaintiff relies on section 91(3) for the legality and validity of its assessments but section 91(3) only gives the Director General a right to impose tax for any year of assessment where it appears to him that (a) any form of fraud or wilful default has been committed by or on behalf of any person; or (b) any person has been negligent. As this is a penal law it must be construed strictly and therefore the courts can only pronounce judgment on the claim if the claim is supported by allegations of fraud or wilful default or negligence. It is true that it is not for the Director General to disclose any of these things to the taxpayer when he makes the assessments but if he seeks to obtain judgment of the court the court must be satisfied that there was fraud or wilful default or negligence on the part of the taxpayer before it can decide whether the assessment was barred by limitation. It is essentially a legal issue and it falls outside the scope of section 106(3) which only lays down that the courts shall not entertain any plea for the amount of tax to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under section 103(4) or (5). In this case no such plea is being raised before the court and therefore in strictly construing the section the court should not extend it to mean no plea shall be entertained by the court. Although this may be a tax case as was stated earlier one cannot read more into the Act than what is expressly and unambiguously stated. The taxpayer, the defendant in this case is not precluded from raising the plea that the claim is statute barred and until and unless the court is satisfied that the Director General exercised his powers correctly when making the assessment under section 91(3) the court cannot possibly adjudicate.

For the reasons stated above the appeal will be dismissed with costs and unconditional leave to defend confirmed.

Appeal dismissed.

Solicitors: *Syarikat Atma Singh Gill & Gill.*

LEE KOH ENG v. PUBLIC PROSECUTOR

[F.C. (Gill C.J. (Malaya), Ong Hock Sim and Wan Suleiman F.JJ.) December 26, 1974]

[Penang — Federal Court Criminal Appeal No. 18 of 1974]

Criminal Law and Procedure — Trial by jury — Jury returning "divided" verdict — Whether judge can direct jury to reconsider verdict — Jury functus officio — Criminal Procedure Code (S.S. Cap. 21), ss. 219(1) and 225.

In this case the appellant was tried on a charge of murder. After the learned judge had summed up at the end of the trial, the jury retired and subsequently returned and the foreman announced that they found the appellant guilty by a majority of 4 to 3. Thereupon the learned judge directed the jury to retire for another try at an acceptable verdict. They did so and returned with a verdict of guilty of the offence charged by a majority of 5 to 2. The learned judge concurred and convicted the appellant and sentenced him to death. On appeal,

Held: (1) the jury having delivered a verdict of guilty by a majority of 4 to 3 and such verdict having been duly recorded, they were thereafter *functus officio* and could not therefore be directed to reconsider and return a second verdict;

(2) the conviction must therefore be quashed and as the trial itself was a nullity, a trial *de novo* should be ordered.

Procedure recommended at conclusion of trial before the jury.

Cases referred to:-

(1) *R.* v. *Sagar* A.I.R. 1934 Oudh 34.

(2) *Girischandra* v. *R.* A.I.R. 1932 Cal. 118.